Supreme Court, U.S.
FILED
JAN 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 88-1491

IN THE SUPREME COURT
COURT OF THE UNITED STATES
OF AMERICA

TERM _____

APPENDICES TO JURISDICTIONAL STATEMENT

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation;
KATHI BAILEY, a married person;
LILLIAN YOUNG, a married person;
TONI STRAUCH, a married person; and
ILSE TAYLOR, representing women who
were members of the Aquarian Foundation
on or after March 17, 1978;

Appellants,

v.

THE SEATTLE TIMES,
a Deleware Corporation,
d/b/a The Seattle Times;
WALLA WALLA UNION-BULLETIN, INC.;
ERIK LACITIS and JANE DOE LACITIS;
JOHN WILSON and REBECCA KAREN WILSON;
JOHN McCOY and KAREN McCOY;

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
WASHINGTON

Counsel for Appellants:
JEAN SCHIEDLER-BROWN
Law Offices of Jean Shiedler-Brown Assoc., PS.
606 Post Ave., Suite 101
Seattle, WA 98104
(206) 223-1888

51pp

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION,a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Plaintiffs,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a/ The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY,

Defendants.

No. 80-2-02460-4

ORDER COMPELLING DISCOVERY OR TO DISMISS

[Clerk's Action Required]

Upon hearing argument by counsel on the Motion of The Seattle Times defendants requesting that plaintiffs' complaint be dismissed with prejudice for failure to comply with the Order Compelling Discovery entered by this court on June 26, 1981, and having reviewed the pleadings and records on file in this case,

IT IS ORDERED that:

1. The Motion of defendants be, and it hereby is, GRANTED, and the complaints of RHINEHART, The AQUARIAN FOUNDATION, and KATHI BAILEY are hereby DISMISSED with prejudice.

DATED this 5th day of December, 1986.

/s/
The Honorable James J. Dore
Superior Court Judge

Presented by:

DAVIS WRIGHT & JONES
Attorneys for Defendants

By /s/
Evan L. Schwab
Bruce E. H. Johnson
Howard Stambor

Approved as to form;
Notice of Presentation Waived:

JEAN SCHIEDLER-BROWN
Attorneys for Plaintiffs

By /s/
Jean Schiedler-Brown

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION,a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Plaintiffs,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a/ The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY,

Defendants.

No. 80-2-02460-4

ORDER COMPELLING DISCOVERY OR TO DISMISS

[Clerk's Action Required]

Upon hearing argument by counsel on the motion of the Seattle Times defendants requesting that plaintiffs be required to produce and permit the inspection and copying by defendants of certain films and videotapes in the possession, custody, or control of the plaintiffs, and plaintiffs having failed to do so pursuant to a request therefore duly served by plaintiff,

IT IS SO ORDERED THAT:

1. The motion of defendants be and it hereby is GRANTED, and that plaintiffs produce and permit defendants to inspect and copy the following fils and videotape:

a. A film made circa 1958 by and/or for NKH-TV, a Japanese television station or network, dealing with scientific testing of the Reverend Rhinehart.

b. A film made circa 1965 by and/or for KTWW-TV, as the first part of a series dealing with the beliefs and principles of the Reverend Rhinehart and/or the Aquarian Foundation.

c. A videotape of the "religious service" conducted before the inmates at the Washington State Penitentiary at Walla Walla, Washington, in 1978 which was made by and/or for the Reverend Rhinehart and/or the Aquarian Foundation.

2. These films and videotapes be produced at the offices of Davis Wright & Jones, 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101-1688, on _____, 1986, at 9:00 a.m.

3. Defendants may withdraw films and videotapes from the possession of plaintiffs for the purpose of having them copied and return them immediately thereafter, or the plaintiffs, at their election, may produce copies for defendants at defendants' expense.

4. If plaintiffs fail to produce the films and videotape on or before December 15, 1986, at 9:00 a.m. (ten days following the entry of this Order), plaintiffs' complaint is DISMISSED with prejudice.

DATED this 5th day of December, 1986.

/s/
The Honorable James J. Dore
Superior Court Judge

Presented by:

DAVIS WRIGHT & JONES
Attorneys for Defendants

By /s/
Evan L. Schwab
Bruce E. H. Johnson
Howard Stambor

Approved as to form;
Notice of Presentation Waived:

Donald B. Kronenberg
Attorneys for Plaintiffs

By /s/
Donald B. Kronenberg

APPENDIX B

1a

APPENDIX A.

In The

SUPERIOR COURT OF THE STATE OF WASHINGTON

For King County

No. S0-2-02460-4

Keith Milton Rhinehart, *et al.*,

Plaintiffs,

vs.

The Seattle Times, *et al.*,

Defendants,

OPINION GRANTING PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

The defendants in this case are engaged in extensive discovery which requires that the plaintiffs disclose a great deal of information which would normally be kept confidential. The Court has ordered disclosure of statements of assets and liabilities, other financial and investment information, names and addresses of persons involved in the Aquarian Foundation and other information which the defendants normally would not receive.

The Court has ordered disclosure of this information pursuant to the provisions of Civil Rule 26(b)(1) which provides as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Those drafting Rule 26 recognized that along with liberal discovery there was a need for protective orders in order to protect a party from abuse or embarrassment and in order to prevent unbridled dissemination of information which a party gained only through the discovery process.

One of the defendants in this case is The Seattle Times, a daily newspaper with a heavy readership in western Washington and which is distributed throughout the entire state.

The Seattle Times asserts that it has a right under the First Amendment of the United States Constitution to print in its newspaper any information it gains through the discovery process in this case. In effect, The Seattle Times argues that Rule 26(c) providing for Protective Orders simply does not apply to a daily newspaper because of its First Amendment rights.

As counsel for the plaintiffs has very ably pointed out, all persons and all legal entities are protected in their freedom of expression by the First Amendment. It applies to everyone, not just newspapers, magazines, radio stations and television stations. Thus there would seem to be no basis for treating a litigant who happens to be a newspaper publisher any different from any other litigant insofar as a litigant's rights under the First Amendment are concerned.

Protective Orders are entered routinely in cases where the party seeking the Protective Order has a reasonable basis for its request that the information gained through discovery be used by the discovering party for no purpose other than the legitimate purposes of the case in which discovery was granted. This means that the information is not disseminated any more than is absolutely necessary for the discovering party to prepare for trial and to try his case.

The plaintiffs here have reasonable grounds for the issuance of such an order in connection with information developed regarding the financial affairs of the various plaintiffs, names and addresses of Aquarian Foundation members and those contributing funds to the Aquarian Foundation and names and addresses of those who have been contributors, clients or made donations to the Aquarian Foundation or the Plaintiff Rhinehart.

Counsel for the defendants has pointed out that a Protective Order cannot apply to information gained by a litigant about his opponent which is not gained through the use of one or more of the discovery vehicles provided by the Civil Rules. This contention is correct. The Protective Order in this case has no application except to information gained by the defendants through the use of the discovery processes.

The intent and purpose of the Protective Order will be that the discovering party make no use of dissemination of the information gained through discovery other than such use as is necessary in order for the discovering party to prepare and try the case. It follows that information gained through the discovery process will not be published by The Seattle Times or made available to any news media for publication or dissemination.

Defendants argue that a Protective Order which has the effect of preventing publication of information gained through discovery in its daily newspaper violates freedom of the press rights guaranteed by the First Amendment. Defendants cite cases in support of their position. The case of *In Re Halkin*, 598 F 2d 176 is a case in point because it involves the use that can be made of information learned through the discovery process. *Halkin* emphasizes the importance of First Amendment

rights and holds that if a Protective Order restricting First Amendment rights is to be entered such an order should be narrow in scope, necessary because of the threatened harm and the lack of any reasonable alternative. *In Re Halkin* holds that the First Amendment applies to discovery materials. In *Halkin* the defendants did not request a Protective Order prior to discovery. The request was made only after the plaintiff [sic] had gained the discovery materials and then announced that it intended to release the information to the press. The Halkin opinion does not deal directly with the question of the relationship between a Protective Order and First Amendment rights.

Provision for a Protective Order was adopted in the first place so that the Court, in the interest of full disclosure and litigation, could order production of information normally kept confidential and then protect against abuse by requiring that the information receive only such dissemination as was necessary in the handling and preparation of the particular case involved.

If Protective Orders are not available, it could have a chilling effect on a party's willingness to bring his case to court. If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as can result from an impingment upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

Counsel for plaintiffs can present an order consistent with this opinion.

DATED AT SEATTLE, WASHINGTON this 10th day of June, 1981

/s/ Jack P. Schofield
Jack P. Schofield, Judge

APPENDIX B

For King County

No. 80-2-02460-4

Keith Milton Rhinehart, a single person; The Aquarian Foundation, a Washington not-for-profit corporation; Kathi Bailey, a married person, Lillian Young, a married person, Toni Strauch, a married person, Sylvia Corwin, and Ilse Taylor, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Plaintiffs

v.

The Seattle Times, a Delaware corporation, d/b/a The Seattle Times; Walla Walla Union-Bulletin, Inc.; Erik Lacitis and Jane Doe Lacitis; John Wilson and Rebecca Karen Wilson; John McCoy and Karen McCoy,

Defendants.

PROTECTIVE ORDER

THIS MATTER having come on upon the motion of the plaintiffs for a protective order, and the court having reviewed the affidavits of Marilou McIntyre, Linda Dunn, Robert Plante, Gillene Avalos, and Catherine Harold, and the court having considered the positions advanced by plaintiffs with respect to the rights of plaintiffs and members of the Aquarian Foundation to freedom of association and religion and to rights of privacy, and the court having considered that the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts, and the court being fully advised, NOW, THEREFORE, IT IS HEREBY ORDERED,

ADJUDGED, AND DECREED:

1. Plaintiffs have reasonable grounds for the issuance of a protective order.
2. Plaintiffs' motion for a protective order is granted with respect to information gained by the defendants through the use of all of the discovery processes regarding the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs.
3. The defendants and each of them shall make no use of and shall not disseminate the information defined in paragraph 2 which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.
4. Defendants' motion for a stay is denied.

June 26, 1981

/s/ Jack P. Schofield
Jack P. Schofield, Judge
King County Superior Court

Presented by:

Edwards and Barbieri

By /s/ Malcolm L. Edwards
Malcolm L. Edwards
Attorneys for Plaintiffs

APPENDIX C

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION,a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978, Plaintiffs, v. THE SEATTLE TIMES, a Delaware corporation, d/b/a/ The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY, Defendants.	No. 80-2-02460-4 ORDER COMPELLING DISCOVERY

[Only paragraph 2. of the order is reproduced herein]

2. Interrogatory No. 31 asked plaintiff Rhinehart to disclose the name and address of everyone who has been a member of the Aquarian Foundation at any time in the past ten years. Interrogatory No.27 to the Aquarian Foundation asks the same question. In lieu of answering the interrogatory at this

time, plaintiffs Rhinehart and the Aquarian Foundation must provide defendants with documentary evidence in support of the Aquarian Foundation's supplemental answer to Interrogatory No. 27, and the plaintiffs are ordered to have those portions of the books and records used to make the diminished membership compilation available for examination at the deposition of defendants' counsel. Following the deposition, if defendants feel that they still cannot defend against the claim of diminished membership without obtaining the names and addresses of the Aquarian Foundation members, they may renew their motion to compel plaintiff Rhinehart to answer Interrogatory No. 31 and to compel the Aquarian Foundation to answer Interrogatory No. 27.

APPENDIX D

THE SUPREME COURT OF WASHINGTON

98 Wn.2d 226, 654 P.2d 673

[Nos. 47938-5, 48155-5 En Banc. December 2. 1982]

KEITH MILTON RHINEHART, *et al, Respondents*, v. THE SEATTLE TIMES COMPANY, *et al, Petitioners*.

[1] Discovery--Constitutional Law--Freedom of Press Information Obtained Through Discovery--Protective Order Validity--Factors. CR 26(c), which permits a trial court to forbid publication of information obtained through discovery upon a showing of "good cause", is constitutional. The First Amendment does not give the news media more right to use information obtained during discovery than any other litigant. To determine if "good cause" exists for a protective order, the court must balance the interests served by protecting the confidentiality of the information (e.g., ensuring the full and truthful disclosure of relevant facts and protecting individuals' legitimate privacy interests in avoiding unwanted publicity) against the interests served by allowing publication of the information (e.g., informing the public of matters of legitimate public concern) under the circumstances. The trial court's decision regarding the issuance of a protective order is reviewed for an abuse of correction.

[2] Discovery--Scope--Effect on Constitutional Rights--Protective Order. The scope of discovery is a matter within the trial court's discretion. Any adverse impact which disclosure has on individual privacy and association rights may be minimized by issuance of a protective order CR 26(c). DOLLIVER, J., BRACHTENBACH, C.J., and DIMMICK, J., concur by separate opinion; UTIER and PEARSON, J.J., dissent by separate opinion.

Nature of action: In an action against two newspapers seeking damages for defamation and invasion of privacy, the

plaintiffs refused to disclose certain information requested during discovery.

Superior Court: The Superior Court for King County, No. 80-2-02460-4, Jack P. Scholfield, J., on June 26, 1981, entered an order compelling discovery and a protective order prohibiting the newspapers from publishing the information acquired through discovery.

Supreme Court: Holding that under the circumstances the protective order did not deny the newspapers freedom of speech and was adequate to safeguard the plaintiffs' privacy and associational interests, the court *affirms* the orders.

Davis, Wright, Todd, Riese & Jones, by *Evan L. Schwab* and *Bruce E. H. Johnson*, for petitioners.

Edwards & Barbieri, by *Malcolm L. Edwards* and *Robert G. Sich*, for respondents.

Gordon G. Conger, Robert B. Mitchell, and *Susan D. Jones* on behalf of KIRO, Inc., amici curiae for petitioners.

[As amended by order of the Supreme Court December 13, 1982.]

ROSELLINI, J.--The Seattle Times published stories concerning the Aquarian Foundation and its leader, Rhinehart, who founded the organization in the 1950's. Articles about the foundation, a "spiritualist church", also appeared in the Walla Walla Union-Bulletin, describing some bizarre performances which were presented at a "religious presentation" staged for inmates at the state penitentiary at Walla Walla.

Rhinehart brought this action on behalf of himself and the foundation, seeking damages for defamation and invasion of privacy. He was joined by four members who participated in the Walla Walla presentation.

The defendants denied many of the allegations and asserted affirmative defenses including claims to privilege. They undertook discovery with respect to the plaintiffs financial affairs, membership and donors. This information was relevant upon the issues of truth and damages. It appears that the attorney for the defendants assured counsel for the plaintiffs that financial materials disclosed to him would be kept confidential. The defendants were provided with income tax returns of Rhinehart and some financial information relating to the other plaintiffs. The plaintiffs refused, however, to disclose other desired information, such as the present address of

Rhinehart, who allegedly had fled the state because of threats to his life resulting from the publicity given the foundation by the defendants.

The defendants sought and were granted an order compelling discovery, and the plaintiffs obtained a protective order limiting the use which could be made of information derived through the discovery process. The order provided:

> 3. The defendants and each of them shall make no use of and shall not disseminate the information . . . which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.

Clerk's Papers, at 26.

The plaintiffs objected to the order compelling discovery on the grounds that it invaded their right to privacy and freedoms of religion and association. The defendants attacked the protective order on the ground that it denied them freedom of of the press and of speech, guaranteed by the first amendment of the United States Constitution and by Const. art. 1, § 5.

The trial court filed for a memorandum opinion explaining the protective order. In that opinion it found that the defendants were entitled to make discovery under Superior Court Civil Rule 26(b)(1) and that the plaintiffs had reasonable grounds for the issuance of a protective order in connection with information covered by the order. It also observed that if protective orders were not available, "it could have a chilling effect on a party's willingness to bring his case to court." The court said:

> If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights

> as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

Clerk's Papers, at 63.

Both of the court's orders are before us on this discretionary review.

[The court's opinion upholding the protective order is not reproduced here.]

[2] Turning to the plaintiffs' cross appeal, the major contention is that requiring disclosure of membership lists, donors and benefactors violates the rights of privacy and the associational rights of these persons. As should be clear from our previous discussion, certain invasions of those rights are necessary to enable the courts to render a just decision upon the relevant facts. The protective order shields the plaintiffs from abuse of the discovery privilege. The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right. There is no showing that the protective order is inadequate to prevent any abuse threatened by the defendants.

The plaintiffs, as the defendants point out, are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information. We have reviewed the cases cited in their brief and find none which supports the theory in the circumstances of this case. All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the court's order insofar as was possible without denying the defendants the right to develop their defenses.

With respect to this order, also, we find no abuse of discretion.

The orders are affirmed.

BRACHTENBACH, C.J., and Stafford, Williams, and Dore, J.J., concur.

APPENDIX E

51 Wash.App. 561

Keith Milton RHINEHART, a single person; the Aquarian Foundation, a Washington not-for-profit corporation; Lillian Young, a married person; and Ilse Taylor, representing women who were members of the Aquarian Foundation on or after March 17, 1978, Appellants,

and

Kathi Bailey, a married person; Toni Strauch, a married person; and Sylvia Corwin, Plaintiffs,

v.

The SEATTLE TIMES COMPANY, a Delaware corporation d/b/a The Seattle Times; The Walla Walla Union Bulletin, Inc.; Erik Lacitis and Jane Doe Lacitis; John Wilson and Rebecca Karen Wilson; John McCoy and Karen McCoy, Respondents.

No. 19801-7-I.

Court of Appeals of Washington,
Division 1.

May 31, 1988.

Reconsideration Denied Aug. 1, 1988.

Religious organization and individual members brought defamation suit against newspaper publisher and others. The Superior Court, King County, James Dore, J., dismissed, and appeal was taken. The Court of Appeals, Swanson, J., held that: (1) organization and members were not entitled to more extensive protective order; (2) First Amendment rights of organization and members were not violated by order compelling discovery of videotapes; (3) names and addresses of organization did not fall within scope of priest-penitent privilege;

(4) dismissal of complaint was warranted due to failure of organization and members to comply with discovery order; and (5) appeal was frivolous.

Affirmed and remanded.

1. Pretrial Procedure 414

Religious organization and individual members, who were granted protective order limiting discovery in their defamation suit arising out of newspaper articles about them to membership, donor and financial information compelled by prior order and restricting use of discovery information to litigation purposes, were not entitled to more extensive protective order covering information gained by means other than discovery process, including films and videotape; any objections to disclosure based upon privacy and confidentiality of members' identities were difficult to justify since two of the requested tapes had already been broadcast to the public on television, protective order which was given prohibited nonlitigation use of information regarding members' identities, and newspaper publisher and other defendants had interest in obtaining discovery in order to prepare trial defense. CR 26(c).

2. Constitutional Law 84.5(1)
Pretrial Procedure 413

Pretrial order, in defamation suit by religious organization and its members arising out of newspaper articles about "extravaganza" sponsored by organization's spiritual leader at state prison, compelling production of films and videotape of "extravaganza" did not violate members' right to free exercise of their religion; prior protective order shielded them against abuse of discovery related to members' identities, and there was no showing that protective order was inadequate to safeguard against any such threatened use of discovery. U.S.C.A Const.Amend. 1.

3. Pretrial Procedure 406

Religious organization and individual members who brought defamation suit arising out of newspaper articles about them failed to show that names and addresses of members fell within scope of priest-penitent privilege and that they were not subject to discovery. West's RCWA 5.60.060(3).

4. Pretrial Procedure 44

Remedy for party's failure to comply with discovery lies within trial court's discretion.

5. Appeal and Error 961

Absent manifest abuse of discretion, appellate court will not overturn trial court's exercise of its broad discretion under rule to impose sanctions for noncompliance with discovery order. CR 37.

6. Pretrial Procedure 435

Dismissal of defamation complaint was warranted due to failure of religious organization and individual members, who were suing newspaper publisher and others for articles about them, to comply with discovery order that they turn over films and videotapes of "extravaganza" at state prison which was subject of articles; publisher and other defendants were prejudiced by withholding of evidence relevant to preparation of their defense. U.S.C.A. Const. Amend. 1; CR 37.

7. Judges 51(1)

Any party in superior court proceeding has statutory right to one change of judge if he files motion supported by an affidavit of prejudice before trial court rules on any motion or issue which requires exercise of discretion. West's RCWA 4.12.040, 4.12.050.

8. Judges 51(2)

For purposes of statutory right of any party in superior court proceeding to one change of judge if he files motion or issue which requires exercise of discretion, setting or renoting and resetting cause or motion for hearing is calendaring action which falls outside the "discretionary" classification. West's RCWA 4.12.040, 4.12.050.

9. Judges 51(2)

For purposes of statutory right of any party in superior court proceeding to one change of judge if he files motion before trial court rules on any motion or issue which requires exercise of "discretion," rulings involving exercise of discretion include granting of continuance, issuance of process upon an application

for a modification of an order, and denial of request for jury trial. West's RCWA 4.12.040, 4.12.050.

10. Appeal--Frivolous Appeal--What Constitutes. An appeal is frivolous warranting the imposition of terms under RAP 18.9(a) if some of the contentions were decided against the appellant in a previous appeal or a related action and other contentions raised no debatable issues upon which reasonable minds could differ.

Nature of Action: Members of a religious organization sought damages for defamation and invasion of privacy from two newspapers. The Supreme Court at 98 Wn.2d 226 previously had affirmed a discovery order and a protective order.

Superior Court: The Superior Court for King County, No. 80-2-02460-4, James J. Dore, J., on December 5, 1986 and January 7, 1987, dismissed the action based on the plaintiffs' noncompliance with the discovery order.

Court of Appeals: Holding that the trial court's denial of a new protective order did not violate the plaintiffs' First Amendment rights, that revealing the names and addresses of the members of the religious organization would not violate the priest-penitent privilege, that the dismissal of the action was within the trial court's discretion, that the plaintiffs' affidavit of prejudice was not timely, that no actual prejudice of the trial judge was shown, and that the appeal was frivolous, the court *affirms* the judgement and *grants* the defendants attorney fees on appeal.

Jean Shiedler-Brown, for appellants.

Bruce E.H. Johnson, Howard Stambor, Davis, Wright & Jones, Evan L. Schwab, and *Bogle & Gates*, for respondents.

SWANSON J.__Keith Milton Rhinehart; the Aquarian Foundation, a Washington not-for-profit corporation; Ilse

Taylor; and Lillian Young[1] appeal the superior court order which dismissed their action for damages for defamation and invasion of privacy against the Seattle Times Company, a Delaware corporation d/b/a The Seattle Times; Walla Walla Union-Bulletin, Inc.; Erik and Jane Doe Lacitis, husband and wife; John and Rebecca Karen Wilson, husband and wife; and John and Karen McCoy, husband and wife. This appeal presents the following issues:

1. Did the dismissal of the appellants' complaint for noncompliance with the order compelling discovery of the films and videotape violate the appellants' right to the free exercise of religion?

2. Was discovery of the Aquarian Foundation's members' names and addresses protected by the priest-penitent privilege?

---

[1] At oral argument appellants' counsel argued for the first time in this appeal that the dismissal of the action as to Ilse Taylor and Lillian Young was improper as a sanction for noncompliance with discovery since these individuals lacked custody or control over the requested videotape and films. At the January 7, 1987, hearing at which the appellants' action was dismissed as a discovery sanction, the respondents' counsel argued that the female plaintiffs were suing in a representative, not individual, capacity on behalf of all women members of the Aquarian Foundation as of March 17, 1978. The complaint appears to substantiate this contention.

In any event, appellants Taylor and Young do not claim, and the record does not indicate, that they responded to the request for production of the videotape and films stating that the tapes were not in their possession, control or custody. See La Chemise Lacoste v. Alligator Co., 60 F.R.D. 164 (D. Del. 1973). Absent a timely response or objection to a discovery request, the right to object may be waived. Fretz v. Keltner, 109 F.R.D. 303, 309 (D. Kan. 1985); 4 L. Orland, Wash. Prac., Rules Practice § 5427, at 153 (3d ed. 1983).

Moreover, appellants Taylor and Young have provided no argument or citation to legal authority in the appellate briefs in support of this contention. RAP 10.3(a)(5); Lassila v. Wenatchee, 89 Wn.2d 804, 809, 576 P2d 54 (1978); Puget Sound Nat'l Bank v. Honeywell, Inc., 40 Wn. App. 313, 317 n.1, 698 P.2d 584 (1985). We thus do not address this issue

3. Was the dismissal of the appellants' complaint for noncompliance with discovery an abuse of discretion?

4. Did the trial court er in denying the appellants' motion for a change of judge?

5. Should the appellants be assessed terms for frivolous appeal?

The facts underlying the action in this case and preceding this appeal have been set forth in Seattle Times Co. v. Rhinehart, 467 U.S. 20, 22-27, 81 L. Ed. 2d 17, 104 S. Ct. 2199, 2202-04 (1984) in part as follows:

> . . . Rhinehart is the spiritual leader of a religious group, the Aquarian Foundation. . . .
>
> In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978, and 1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The

four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla State Penitentiary. The articles stated that he had treated 1,100 inmates to a 6-hour-long show, during which he gave away between $35,000 and $50,000 in cash and prizes. On article described a "chorus line of girls [who] shed their gowns and bikinis and sang . . . ." . . .

Rhinehart brought this action in the Washington Superior Court on behalf of himself and the Foundation against the Seattle Times, the Walla Walla Union-Bulletin, the authors of the articles, and the spouses of the authors. Five female members of the Foundation who had participated in the presentation at the penitentiary joined the suit as plaintiffs. The complaint alleges that the articles contained statements that were "fictional and untrue," and that the defendants—petitioners here—knew, or should have known, they were false. According to the complaint, the articles "did and were calculated to hold [Rhinehart] up to public scorn, hatred and ridicule, and to impeach his honesty, integrity, virtue, religious philosophy, reputation as a person and in his profession as a spiritual leader." With respect to the Foundation, the complaint also states: "[T]he articles have, or may have had, the effect of discouraging contributions by the membership and public and thereby diminished the financial ability of the Foundation to pursue its corporate purposes." The complaint alleges that the articles misrepresented the role of the Foundation's "choir" and falsely implied that female members of the Foundation had "stripped off all their clothes and wantonly danced naked . . . ." The complaint requests $14,100,000 in damages for the alleged defamation and invasions of privacy.

Petitioners filed an answer, denying many of the allegations of the complaint and asserting affirmative defenses. Petitioners promptly initiated extensive discovery. They deposed Rhinehart, requested production of documents pertaining to the financial affairs of Rhinehart and the Foundation, and served extensive interrogatories on Rhinehart and the other respondents. Respondents turned over a number of financial documents, including several of Rhinehart's income tax returns. Respondents refused, however, to disclose certain financial information, the identity of the

Foundation's donors during the preceding 10 years, and a list of its members during that period.

Petitioners filed a motion under the State's Civil Rule 37 requesting an order compelling discovery. . . . Respondents . . . moved for a protective order preventing petitioners from disseminating any information gained through discovery. . . .

In a lengthy ruling, the trial court initially granted the motion to compel and ordered respondents to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated. The court also required respondents to divulge enough membership information to substantiate any claims of diminished membership. Relying on *In re Halkin*, 194 U. S. App. D. C. 257, 598 F.2d 176 (1979), the court refused to issue a protective order. It stated that the facts alleged by respondents in support of their motion for such an order were too conclusory to warrant a finding of "good cause" as required by Washington Superior Court Civil Rule 26(c). . . .

Respondents filed a motion for reconsideration in which they renewed their motion for a protective order. They submitted affidavits of several Foundation members to support their request. . . .

Persuaded by these affidavits, the trial court issued a protective order covering all information obtained through the discovery process that pertained to "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs." The order prohibited petitioners from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. By its terms, the order did not apply to information gained by means other than the discovery process.

(Footnotes and citations omitted.)

Upon cross petitions for review, our State Supreme Court upheld the protective order against an attack on the basis of freedom of the press and of speech and the June 26, 1981, order compelling discovery against a challenge on

grounds of violations of the rights of privacy and of association. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 257–58, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984). The United States Supreme Court denied the appellants' petition for certiorari, 467 U.S. 1230 (1984), but granted the respondents' petition and upheld the protective order, *Seattle Times Co. v. Rhinehart*, 467 U.S. at 37.

During this time the original trial judge, who had moved to the State Court of Appeals, was replaced in the instant case by another judge. Upon the respondents' motion, the appellants were ordered to comply with the June 26, 1981, order compelling discovery by October 19, 1984. On that date, the appellants supplied nonresponsive and incomplete answers. In December 1984, the respondents served the appellants with a request for production of certain films and a videotape of the Walla Walla performance. The appellants did not file timely objections or responses.

A challenge to the same requests for production was pending in this court. In *Rhinehart v. KIRO*, 44 Wn. App. 707, 708–09, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co.*, 108 S. Ct. 51 (1987), this court held that the order compelling discovery of the films and videotape did not violate the appellants' freedom of religious exercise. *KIRO*, at 711, further upheld the dismissal of the appellants' action against the respondents in that appeal for noncompliance with discovery.

In the instant case a scheduled October 31, 1986, hearing on the respondents' motions for dismissal for noncompliance with the 1981 discovery order and for a second order compelling discovery of the films and videotape was continued at the appellants' request because of a substitution of counsel. At this hearing the appellants' request for a change of judge was denied. At the rescheduled December 5, 1986, hearing, the trial judge dismissed the complaint of Rhinehart, the Aquarian Foundation and Kathi Bailey for noncompliance with the June 26, 1981, order compelling

discovery; ordered the production by December 15, 1986, of the films and videotape requested by the respondents; and denied the appellants' motions for a protective order and for clarification of the June 26, 1981, discovery order.

The appellants did not comply with the December 5, 1986, order compelling discovery. After a January 7, 1987, hearing, the trial judge entered findings of fact and conclusions of law and dismissed the complaint of all the plaintiffs for failure to comply with the December 5, 1986, order compelling discovery and denied the appellants' motion for reconsideration of the prior orders. This appeal followed. After oral argument the respondents filed a motion for leave to correct or supplement the record pursuant to RAP 9.10, which motion, unopposed by the appellants, was granted.

Free Exercise of Religion

The appellants contend that their First Amendment rights were violated by the dismissal of their complaint for noncompliance with the order compelling discovery of the films and videotape, which the appellants claim are sacred objects. The respondents assert that the claim that the tapes' sanctity precludes discovery is suspect in light of the television broadcast to the public of the films and the fact that the videotape was of a performance before 1,100 prison inmates. They further contend, without dispute, that upon the December 1984 service of the request for production of the films and videotape, the appellants failed to object within the time period required by CR 34(b). Consequently, they argue, any objection has been waived.

> A waiver of the right to object or of a protective order may result from a failure timely to respond or object [to a request for the production of documents]. *Alexander v. Parsons* (D.C.Mich.1977) 75 F.R.D. 536; *Perry v. Golub* (D.C.Ala.1976) 74 F.R.D. 360; *Leve v. Schering Corp.* (D.C.N.J.1975) 73 F.R.D. 537, *affirmed* (C.A.3d) 556 F.2d 567, *certiorari denied* 434 U.S. 833, 98 S.Ct. 118, 54 L.Ed.2d 93.

4 L. Orland, Wash. Prac., *Rules Practice* § 5427, at 153 (3d ed. 1983). In any event, we find no First Amendment violation.

The appellants argue that the denial of a requested protective order resulted in the violation of their right to the free exercise of religion since they were compelled to provide discovery of what they consider to be sacred objects without a proper protective order. The only protective order entered in the instant case is limited to discovery of membership, donor and financial information which was compelled by the June 26, 1981, order and restricts use of the discovery information to litigation purposes.

On November 26, 1986, the appellants filed a motion for a protective order as to discovery of the films and videotape which would have imposed the following restrictions:

> 2. Plaintiffs may comply with defendant Seattle Times' Second Request for Production of Documents as follows:
>
> (a) by allowing defendants to view the relevant portions of the films and videotapes requested therein in which the identities of person[s] depicted in the films and videotapes have been obscured.
>
> (b) that defendants need only produce for viewing such portions of the films and videotapes as defendants reasonably specify will provide information likely to lead to admissible evidence.
>
> (c) that defendants be prohibited from making any public disclosure of the films or making any use thereof except for the legitimate purposes of preparing for trial and no portions thereof should be entered into [the] public record without further order of this court.

The motion expressly states that the proposed protective order sought to permit compliance with production by allowing the respondents to view the films and videotape in the church. Besides limiting the films' use to litigation purposes, the requested protective order, unlike the prior protective order entered in the case, sought to impose certain other restrictions and conditions.

The respondents argue that *Rhinehart v. KIRO*, 44 Wn. App. 707, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d

1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co.*, 108 S. Ct. 51 (1987), is controlling. In *KIRO*, at 708–09, an order compelling discovery of the three videotapes at issue in the instant case survived a challenge on grounds of a violation of the freedom to exercise religion. *KIRO*, at 709, notes that no showing was made that the protective order was inadequate to prevent abuse of discovery. The protective order in *KIRO* is similar to the 1981 protective order entered in the instant case in limiting the use of the discovery information to litigation purposes. *KIRO*, at 708.

The 1981 protective order was found not to violate freedom of the press or of speech. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 256, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984). Thus had the appellants sought such a protective order as to the compelled discovery of the films and videotape, it could not have been attacked on these First Amendment grounds. Instead, the appellants sought a protective order which would have imposed other restrictions and conditions. *Rhinehart*, at 257, states:

> The more extensive protection which [the plaintiffs] desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right.

The appellants here had no absolute right to a more extensive protective order.

[1, 2] CR 26(c) sets forth the procedure for requesting a protective order:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .

See Rhinehart, at 232. "'[G]ood cause' is established if the moving party shows that any of the harms spoken of in the

rule is threatened and can be avoided without impeding the discovery process." *Rhinehart*, at 256.

The appellants argue that the protective order was necessary to satisfy their objections to the discovery based upon privacy concerns, the priest–penitent privilege and the sacredness of the tapes. However, any objections to disclosure based upon privacy, the confidentiality of members' identities, and the showing of the tapes outside the sanctity of the church are difficult to justify since two of the requested tapes have already been broadcast to the public on television. *Rhinehart v. KIRO, supra* at 708–09. Further, the 1981 protective order prohibited the nonlitigation use of information regarding the members' identities acquired through the discovery process.

To be weighed against the appellants' asserted interests are the interests of the respondents, who are seeking discovery in order to prepare their trial defense. *See Rhinehart v. Seattle Times Co., supra* at 256. As both *Rhinehart v. Seattle Times Co., supra* at 257–58, and *Rhinehart v. KIRO, supra* at 709, note, the appellants "are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information." In requesting the particular protective order that they proposed, the appellants have failed to make the requisite "good cause" showing that any of the harms mentioned in the rule was threatened and could be avoided without impeding the discovery process. *Rhinehart v. Seattle Times Co., supra* at 256. The trial court did not abuse its discretion in denying the request for the more extensive protective order. *Rhinehart*, at 257.

Even if the refusal to issue the proposed protective order was not an abuse of discretion, the question is whether the order compelling the production of the films and videotape violated the appellants' right to the free exercise of their religion. Like the court in *Rhinehart v. KIRO, supra* at 708–09, we find meritless the appellants' argument that their freedom to exercise religion was violated by the order compelling discovery of the tapes. The cases upon which

they rely involve restrictions on the free exercise of religion and are inapposite. The discovery order here did not impinge upon their right to the free exercise of religion.

As *KIRO*, at 709, notes:

> Rhinehart and the Foundation are willing to allow KIRO and KOMO to view the "sacred" tapes. Their main objection is to their copying. It is thus not against their religious principles that these tapes may be viewed by persons other than members (such a position would be hard to maintain since two of the tapes had already been broadcast to the public at large). Rather, the appellants fear that the tapes will be disseminated to the public at large thus putting members at risk. It was precisely because of this argument that the trial court issued the protective order. The arguments propounded by appellants are really ones that should be made in support of an invasion of privacy action. Having lost this argument already, it appears that appellants are substituting religious freedom in its place.

Here the 1981 protective order shields the appellants against abuse of discovery related to the members' identities. In *Rhinehart v. Seattle Times Co., supra* at 257, our State Supreme Court found no showing that this same protective order was inadequate to safeguard against any such threatened abuse of discovery. Like the court in *Rhinehart v. KIRO, supra*, in which a similar protective order was entered upon the issuance of an order compelling discovery of the same films and videotape at issue here, we find no such a showing in the instant case.

Priest–Penitent Privilege[2]

RCW 5.60.060(3)[3] sets forth the priest–penitent privilege:

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[2]The respondents contend that an objection to discovery based upon the priest–penitent privilege is untimely, not having been asserted in the appellants' original responses to the discovery request, in their 1981 arguments to the trial court, or in their prior appeal of the order compelling discovery of, among other things, membership information. Our disposition of the privilege issue makes it unnecessary to address this contention.

> A clergyman or priest shall not, without the consent of a person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

[3] Although no Washington case has construed this statute, L. Orland and K. Tegland explain this privilege, including its limited scope, as follows:

> It provides that a priest or clergyman shall not be examined regarding any confession made to him in his professional capacity within the discipline of the church to which he belongs without the consent of the person making the confession. In statement the statute is narrow, requiring that the confession be made "in the course of discipline enjoined by the church to which he belongs." The proposed, but unadopted, privilege in the Federal Rules of Evidence would have protected a confidential communication to a clergyman in his professional character as spiritual advisor.

(Footnotes omitted.) Orland & Tegland, *The Federal Rules of Evidence: Washington Follows the Federal Model*, 15 Gonz. L. Rev. 277, 327–28 (1980).

> In the application of the [priest–penitent privilege] statutes, . . . it has been held, following the dictates of principle, that the privilege applies only to a communication made in the understood pursuance of that church discipline which gives rise to the confessional relation, and, therefore, in particular to confessions of sin only, not to communications of other tenor.

In re Estate of Soeder, 7 Ohio App. 2d 271, 302, 220 N.E.2d 547, 568–69 (1966); 8 J. Wigmore, *Evidence* § 2395, at 876–77 (1961). The appellants have not shown that the names and addresses of the Aquarian Foundation members fall within the scope of this privilege.

Dismissal of Complaint

On December 5, 1986, an order was entered dismissing the complaint of Rhinehart and the Aquarian Foundation

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[3]In 1987 RCW 5.60.060(3)'s language was altered to be gender neutral. Laws of 1987, ch. 439, § 11, p. 1791.

for failure to comply with the June 26, 1981, order compelling discovery of, among other things, membership information. On January 7, 1987, the trial court entered findings of fact, conclusions of law and an order dismissing the appellants' complaint for violating the December 5, 1986, order compelling discovery of certain films and a videotape.

CR 37(b)(2)(C) provides in part:

> If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party[.]

The remedy for a party's failure to comply with discovery lies within the trial court's discretion. *Rhinehart v. KIRO*, 44 Wn. App. 707, 710, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co.*, 108 S. Ct. 51 (1987). Absent a manifest abuse of discretion, the appellate court will not overturn the trial court's exercise of its broad discretion under CR 37 to impose sanctions for noncompliance with a discovery order. *Rhinehart v. KIRO*, *supra*.

[4] In *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 228–29, 548 P.2d 558, *review denied*, 87 Wn.2d 1006 (1976), this court stated that

> the sanction of a default judgment authorized by CR 37(b)(2)(C) is a harsh remedy, which should only be granted where there has been a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial.
>
> But the unexplained failure to furnish complete and meaningful answers to these material interrogatories in the face of the court's order impels a conclusion that the refusal was willful. In this connection we note that CR

> 37(a)(3) allows the court to treat an evasive or incomplete answer as a "failure to answer." In our opinion, any violation of an explicit court order without reasonable excuse or justification must be deemed a willful act.
>
> We next turn to the contention that the sanction was unjust in that other less drastic alternatives to default would have been sufficient. Cases are legion holding that the choice of sanctions for violation of a discovery order is discretionary and that the particular facts and circumstances of each case will determine whether the discretion has been abused. In this state CR 37 vests broad discretion in the trial court as to choice of sanctions. A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

(Citations omitted.) *See Anderson v. Mohundro*, 24 Wn. App. 569, 573–74, 604 P.2d 181 (1979), *review denied*, 93 Wn.2d 1013 (1980).

The appellants contend that they substantially complied with the discovery order by supplying substantial information, including over 150 articles, while seeking to uphold their rights to privacy, freedom of association and freedom of religious exercise. They further contend that no prejudice to the respondents has been shown in that the videotapes sought concern only collateral issues and the respondents' interests are adequately protected by the appellants' offer to permit the tapes to be viewed in the church. Last, the appellants argue that dismissal was too severe a sanction since the videotapes had only limited relevance to either the claims or possible defenses and the appellants themselves would be unable to use the tapes at trial, thus jeopardizing their ability to sustain their burden of proof.

In June 1980 the respondents served on the appellants interrogatories and requests for production to which the appellants raised objections and filed vague and evasive responses. The respondents moved to compel discovery, and the appellants moved for a protective order. After several hearings on the two motions, the trial judge entered

both an order compelling discovery and a protective order on June 26, 1981. Upon cross petitions for review, our State Supreme Court upheld both orders. The United States Supreme Court denied the appellants' petition for certiorari, 467 U.S. 1230 (1984), but granted the respondents' petition and upheld the protective order, 467 U.S. 20, 37, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984).

On August 20, 1984, the appellants were ordered to comply with the June 26, 1981, order compelling discovery by October 19, 1984. On that date, the appellants provided incomplete and evasive responses.

In December 1984 the respondents requested that the appellants produce certain films and a videotape which they claim are relevant to the appellants' status as public figures, to the truth of the respondents' publications and to the damages which the appellants allegedly suffered. The requested videotape is of the Walla Walla performance, which was the subject of the respondents' publications that the appellants claim are defamatory. The appellants failed timely to object or respond to these requests. At the time, appellate review was pending of legal challenges to the same requests for production in *Rhinehart v. KIRO*, 44 Wn. App. 707, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co.*, 108 S. Ct. 51 (1987). *KIRO* found meritless the appellants' objection to discovery on grounds of freedom of religious exercise and upheld the dismissal of the appellants' action as a discovery sanction under CR 37.

At the October 31, 1986, scheduled hearing on the respondents' motions (1) to dismiss the appellants' complaint for failure to comply with the 1981 order compelling discovery and (2) to compel production of the films and videotape, the appellants were granted a continuance based upon the substitution of counsel and were assessed terms of $250, and the appellants filed an affidavit of prejudice against the trial judge.

At the continued December 5, 1986, hearing, the trial court granted the respondents' motions to dismiss and to

compel production and denied the appellants' motions for a protective order and for clarification of the 1981 discovery order. The appellants did not comply with the December 5, 1986, order compelling discovery and filed a motion for reconsideration of the prior orders, which was subsequently denied. On January 7, 1987, findings and conclusions were entered and the appellants' complaint was dismissed with prejudice a second time based upon their failure to comply with the December 5 discovery order.

The facts here are similar to those in *Anderson v. Mohundro, supra* at 574–75, and *Rhinehart v. KIRO, supra* at 711. The appellants either supplied vague and incomplete answers or failed to respond to the interrogatories and requests for production so that the respondents were required to seek orders compelling discovery. The trial court issued two separate orders requiring compliance with discovery requests, subject to the protective order, and allowed a reasonable time for compliance. The appellants gave incomplete and evasive answers or no response. After hearing the parties' arguments, the trial court found that the appellants had violated the orders compelling discovery and entered orders of dismissal on December 5, 1986, for noncompliance with the June 26, 1981, discovery order and on January 7, 1987, for refusing to obey the December 5, 1986, discovery order.

Although the appellants claim that their failure to comply was neither willful nor deliberate since it was based upon their First Amendment rights, these objections were rejected in *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984), and *Rhinehart v. KIRO, supra*. "A violation of the discovery rules is willful if done without a reasonable excuse." *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836, 696 P.2d 28, *review denied*, 103 Wn.2d 1040 (1985); *Rhinehart v. KIRO, supra*. The respondents have been prejudiced by the withholding of evidence relevant to the preparation of their defense, and no less drastic sanction would suffice. *See Hampson v. Ramer*, 47 Wn. App.

806, 815, 737 P.2d 298 (1987); *Anderson v. Mohundro, supra* at 575. We will not disturb the trial court's exercise of discretion here. *Rhinehart v. KIRO, supra.*

ALLEGED TRIAL COURT PREJUDICE

Under RCW 4.12.040 and .050, any party in a superior court proceeding has the right to one change of judge if he files a motion supported by an affidavit of prejudice before the trial court rules on any motion or issue which requires the exercise of discretion. *State v. Hansen,* 107 Wn.2d 331, 333, 728 P.2d 593 (1986); *In re Estate of Shaughnessy,* 104 Wn.2d 89, 92, 702 P.2d 132 (1985).

The appellants contend that the denial of their request for a change of judge was error since no discretionary ruling had been made before the affidavit of prejudice was filed. Discretionary rulings exclude

> the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail[.]

RCW 4.12.050; *Wilson v. Henkle,* 45 Wn. App. 162, 172, 724 P.2d 1069 (1986). Setting or renoting and resetting a cause or motion for hearing is a calendaring action which falls outside the discretionary classification. *State v. Dixon,* 74 Wn.2d 700, 703, 446 P.2d 329 (1968).

Rulings involving the exercise of discretion include the granting of a continuance, *State v. Maxfield,* 46 Wn.2d 822, 829, 285 P.2d 887 (1955); the issuance of process upon an application for a modification of an order, *State ex rel. Mead v. Superior Court,* 108 Wash. 636, 640, 185 P. 628 (1919); and the denial of a request for a jury trial, *State ex rel. Farmer v. Bell,* 101 Wash. 133, 134, 172 P. 221 (1918).

[5] The exercise of discretion is not involved where a certain action or result follows as a matter of right upon a mere request; rather, the court's discretion is invoked only where, in the exercise of that discretion, the court may either grant or deny a party's request. *State ex rel. Mead v. Superior Court, supra.* Here both the August 20, 1984,

order setting October 19, 1984, as the date for complying with the June 26, 1981, discovery order and the October 31, 1986, order permitting the substitution of counsel were discretionary rulings so that the affidavit of prejudice was filed too late.[4]

The rulings in the instant case are distinguishable from the judge's actions which were found not to involve the exercise of discretion in *In re Hiebert*, 28 Wn. App. 905, 910, 627 P.2d 551 (1981). In *Hiebert*, at 909, the judge had reappointed the same guardian ad litem for the child, appointed an attorney for the father, reappointed the attorney for the mother, and set the case for hearing upon a second petition for permanent deprivation of parental rights. *Hiebert*, at 910, notes: "In most cases, only after the appointment of counsel would the law pertaining to affidavits of prejudice be known to the party." In the instant case, prior to the most recent substitution of appellants' counsel, the appellants had other attorneys representing them so that *Hiebert* is inapposite. Setting the case for a hearing in *Hiebert* was a calendaring action excluded from the discretionary classification under RCW 4.12.050. *Wilson v. Henkle, supra.*

[6] Although prejudice is not deemed to be established since the appellants failed timely to comply with the statutory requirements, *State v. Cockrell*, 102 Wn.2d 561, 565, 689 P.2d 32 (1984), the appellants nonetheless argue that actual prejudice is shown in certain comments of Judge Dore during the proceedings. Since the appellants cite no legal authority in support of their actual prejudice argument, we need not address this issue. *Puget Sound Nat'l Bank v. Honeywell, Inc.*, 40 Wn. App. 313, 317 n.1, 698 P.2d 584 (1985). In any event, the appellants have failed to

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[4]The letter purportedly reserving the appellants' right to file an affidavit of prejudice against Judge Dore, referred to in the Brief of Appellants, at 4, is not in the record. The citation to the record indicated in the appellants' brief is to a "Declaration of Counsel" in which the appellants' present counsel states, among other things: "This case is preassigned and to my knowledge the assigned judge has not made decisions affecting these substantive matters."

make the requisite "affirmative showing of prejudice which would alter the outcome of the pending litigation" to be entitled to relief on this ground. (Citation omitted). *Williams & Mauseth Ins. Brokers, Inc. v. Chapple,* 11 Wn. App. 623, 629, 524 P.2d 431 (1974).

The judge's comments at the October 31, 1986, December 5, 1986, and January 7, 1987, hearings, which were made in rendering his decisions on motions before him, do not necessarily and inevitably compel the conclusion that the trial court was prejudiced against the appellants. *Williams & Mauseth Ins. Brokers, Inc. v. Chapple, supra.* At the October 31 hearing the judge granted the appellants' motion for a continuance and assessed them $250 in terms. Nevertheless, it cannot be said that the award of terms is evidence of unfair prejudice against the appellants since a continuance was sought on the basis that on the day of the scheduled hearing on the respondents' motions to dismiss and to compel production of the videotape and films, the appellants requested the substitution of counsel and their new counsel requested time to review the record before a hearing on the motions.

At the December 5 hearing the respondents' proposed orders to compel discovery or dismiss and to dismiss were entered, but their request for reimbursement of their incurred expenses was denied. Similarly on January 7, 1987, the respondents' second proposed order of dismissal was entered and the appellants' reconsideration motion was denied, but an assessment of terms against the appellants was denied.

Frivolous Appeal

The respondents seek, on two grounds, an attorney fee award as terms for a frivolous appeal. The first basis, CR 11, which is made applicable to appeals by RAP 18.7, provides in part:

> The signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion, or legal memorandum; that to the best of his knowledge,

> information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

See Miller v. Badgley, 51 Wn. App. 285, 298–99, 753 P.2d 530 (1988). A party or an attorney or both may be assessed litigation expenses, including reasonable attorney fees, for a CR 11 violation. *See Wilson v. Henkle*, 45 Wn. App. 162, 174, 724 P.2d 1069 (1986). Here in entering the second order of dismissal, the trial court concluded that the appellants' objections to complying with the December 5, 1986, order compelling discovery were "frivolous and in bad faith because this issue has already been decided against them in this lawsuit and in another lawsuit."

[7] The respondents' second asserted basis for an attorney fee award, RAP 18.9(a), authorizes this court to impose sanctions against a party who brings an appeal for the purpose of delay where the other party is harmed by the delay. *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983). An appeal is frivolous and brought for the purpose of delay if it presents no debatable issues upon which reasonable minds might differ and is so devoid of merit that there was no reasonable possibility of reversal. *Millers Cas. Ins. Co. v. Briggs, supra*.

Here even if some of the issues presented in this appeal have not been waived, the issues are devoid of merit with no reasonable possibility of reversal since most of the issues are governed by *Rhinehart v. Seattle Times Co., supra,*

and *Rhinehart v. KIRO, supra*, and the other issues are not debatable issues upon which reasonable minds might differ.

We affirm the judgment below and award terms for a frivolous appeal. Under RAP 18.1(e) we remand for the trial court to determine what it deems to be a reasonable amount of the respondents' appellate attorney fees which is to be assessed against the appellants as terms. *See Singleton v. Frost*, 108 Wn.2d 723, 730–34, 742 P.2d 1224 (1987).

WILLIAMS and GROSSE, JJ., concur.

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION,a Washington not-for-profit corporation; LILLIAN YOUNG, a married person, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Appellants,

and

THE SEATTLE TIMES, a Delaware corporation, d/b/a/ The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY,

Respondents.

No. 19801-7-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellants having filed their motion for reconsideration herein; the respondents having filed their answer to said motion, and the court having determined that it should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same hereby is, denied.

Dated this 1st day of August, 1988.

/s/
Acting Chief Judge

APPENDIX G

The Supreme Court
State of Washington

November 29, 1988

Ms. Jean M. Schiedler-Brown
Attorney at Law
606 Post Avenue, #101
Seattle, Washington 98104

Davis, Wright & Jones
Mr. Bruce E. Johnson
Mr. Howard E. Johnson
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688

Re: Supreme Court No. 55515 - 0 -
Keith Milton Rhinehart, et al.
v. The Seattle Times, et al.
Court of Appeals No. 19801 - 7 - I

Counsel:

The above entitled petition for review was considered by the court on its November 29, 1988, petition for review calendar.

The petition was denied by order number 185/78 filed on November 29, 1988.

Very truly yours,
/s/ Steven P. Helgeson
Deputy Clerk

SPH : mja

APPENDIX H

Superior Court No. 80-2-02460-4
Appeals Court No. 19801-7-I
Supreme Court No. 55515-0

IN THE SUPREME
COURT OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington not-for-profit corporation;
KATHI BAILEY, a married person;
LILLIAN YOUNG, a married person;
TONI STRAUCH, a married person; and
ILSE TAYLOR, representing women who
were members of the Aquarian Foundation
on or after March 17, 1978;

Appellants,

v.

JAN 18 1989
COURT OF APPEALS
OF WASHINGTON

THE SEATTLE TIMES,
a Delaware Corporation,
d/b/a The Seattle Times;
WALLA WALLA UNION-BULLETIN, INC.;
ERIK LACITIS and JANE DOE LACITIS;
JOHN WILSON and REBECCA DAREN WILSON;
JOHN McCOY and KAREN McCOY;

Respondents.

NOTICE OF APPEAL
TO U.S. SUPREME COURT

JEAN SCHIEDLER-BROWN
Attorney for Appellant

Superior Court No. 80-2-02460-4
Appeals Court No. 19801-7-I
Supreme Court No. 55515-0

IN THE SUPREME
COURT OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART,
a single person;
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JOHN WILSON and REBECCA DAREN WILSON;
JOHN McCOY and KAREN McCOY;

Respondents.

NOTICE OF APPEAL
TO U.S. SUPREME COURT

JEAN SCHIEDLER-BROWN
Attorney for Appellant

RECEIVED
JAN 18 1989
CLERK OF SUPREME COURT
STATE OF WASHINGTON

Superior Court No. 80-2-02460-4
Appeals Court No. 19801-7-I
Supreme Court No. 55515-0

JAN 18 1989
Superior Court Clerk

IN THE SUPREME
COURT OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington not-for-profit corporation;
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JOHN McCOY and KAREN McCOY;

Respondents.

NOTICE OF APPEAL
TO U.S. SUPREME COURT

JEAN SCHIEDLER-BROWN
Attorney for Appellant

APPENDIX I

U.S. CONSTITUTION
AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX I

U.S. CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX K

RCW 4.84.185

4.84.185 Prevailing party to receive expenses for opposing frivolous action or defense. In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after an order of dismissal, order on summary judgement, or final judgement after the trial or other final order terminating the action as to the prevailing party. In no event may such motion be filed more than thirty days after entry of the order. The judge shall consider the action, counterclaim, cross-claim. third party claim, or defense as a whole.

The provisions of this section apply unless otherwise specifically provided by statute. [1987 c 212 § 201; 1983 c 127 § 1.]